IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
October 23, 2007 Session

STATE OF TENNESSEE v. CHERYL BASS

Direct Appeal from the Circuit Court for Williamson County
No. II-CR04204 Timothy L. Easter, Judge

No. M2006-02563-CCA-R3-CD - Filed February 28, 2008

The defendant, Cheryl Bass, was convicted by a jury of criminal simulation with a value of less than $1,000, theft of property greater than $1,000 but less than $10,000, tampering with the evidence, and forgery. The defendant was sentenced to one year for criminal simulation, a Class E felony; three years for theft, a Class D felony; four years for tampering with evidence, a Class C felony; and one year for forgery, a Class E felony. At her sentencing hearing the trial court ordered the defendant's sentences to run concurrently and imposed a total effective sentence of four years. On appeal, the defendant argues that there was insufficient evidence to sustain her convictions, the trial court improperly sentenced her to four years confinement, the court improperly assessed fines against her, and the trial court failed to grant a new trial in light of newly discovered evidence. In addition, the defendant argues that the jury received improper instructions and that violations of her Fourth Amendment right against search and seizure warrant suppression of the evidence against her. Upon review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and ROBERT W. WEDEMEYER, J., joined.

David L. Raybin (on appeal), Nashville, Tennessee, and Eric L. Davis (at trial), Franklin, Tennessee, for the appellant, Cheryl Bass.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Ronald L. Davis, District Attorney General; and Kim R. Helper and Mark K. White, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

The following evidence was presented at the defendant's trial. Detective Charles Warner testified that on January 6, 2004, he and his partner, Detective Arlena Clausi, were investigating the

passing of counterfeit certificates at a local area McDonald's restaurant. Detective Warner recounted that in November 2003, McDonald's employees contacted police and reported an individual matching the defendant's description and driving a white Honda similar to the defendant's passed counterfeit food coupons at the restaurant. Detective Warner and Detective Clausi called upon the defendant at her home and explained that they were police officers who wished to speak with her about the investigation. Initially, the defendant stated that she did not want to talk to the officers, but after Detective Warner expressed the belief that the matter might be resolved within a few minutes, the defendant relented and allowed the officers inside her home.

Detective Warner testified that he and Detective Clausi entered the home, the defendant demanded that they remove their shoes, which they declined to do, and the defendant became uncooperative. Detective Warner informed the defendant that if she would permit an examination of her computer, the investigation into the issue of counterfeit coupons could be resolved quickly. The defendant refused, became combative, and refused any cooperation stating she would "make things as difficult as possible." At one point, the defendant's husband arrived home and encouraged the defendant to turn the computer over to the detectives, but the defendant persisted in her refusal. The defendant told detectives she needed to leave to pick up her daughter. Detective Warner told her she was free to go, but that he intended to "freeze" the house in order to obtain a warrant to search the defendant's house and car. The defendant was permitted to leave and get her daughter, but she was not permitted to take her own car. Detective Warner stated that the defendant took her husband's car instead and left to get her daughter. Detective Warner left Detective Clausi at the residence to secure it with other detectives while he obtained a search warrant.

Detective Warner testified that he returned to the defendant's residence and presented the defendant, her husband, and their attorney with a copy of the search warrant. Thereafter, detectives searched the house and Detective Warner compiled a master log detailing the time, date, location, and nature of all evidence collected. Detectives located coupons and gift certificates in the defendant's car, the kitchen, and the upstairs bathroom. Detective Warner identified several Opry Mills gift certificates found in the kitchen. The sizes of certificates were uneven and had repeating serial numbers. Detective Warner identified other coupons and certificates, all cut unevenly or altered, with values between $200 and $400 and containing repeat serial numbers. Detective Warner also identified a separate packet of $25 gift certificates for Opry Mills, three of which appeared to be valid, and three that were possibly counterfeit. He testified that the counterfeit certificates contained the same serial numbers as the authentic certificates, had uneven edges, and did not bear the temperature-adjusting orange watermark on the back of the certificates found on the originals. Detective Warner also testified that several torn counterfeit McDonald's gift certificates were recovered from the wastebasket in the upstairs bathroom.

Detective Warner testified that detectives also recovered what appeared to be a reimbursement check in the amount of $2,528.56 made payable to Mark Hartman. Along with the check, detectives found a social security statement for Mark Hartman and an AOL/DSL modem belonging to Mr. Hartman in a box in the basement closet of the defendant's house. In the defendant's purse, detectives found a military identification card. In the kitchen, detectives found

additional military identification cards which appeared to have been copied and cut. Detective Warner stated that two cards contained the defendant's picture, name, social security number, and described the defendant as "Mil - Tech Sgt." Another card contained the same information and described the defendant as "Mil. Active Reservist." A pair of scissors were found near the military identification cards.

On cross-examination, Detective Warner testified that he left the defendant's residence to obtain a search warrant. As a result, he was not present when the defendant and her daughter locked themselves in an upstairs bathroom and denied access to detectives. However, Detective Warner identified photographs taken of the torn remains of coupons and certificates found in and around the upstairs bathroom trash can by Detective Kevin Adams after the defendant and her daughter left the bathroom. Detective Warner admitted that no scissors were found in the upstairs bathroom, but a pair of scissors were found downstairs in the kitchen pantry in a Kroger bag containing the military identification cards Detective Warner previously identified.

Detective Arlena Clausi testified that she arrived at the defendant's residence, and the defendant was hostile to the detectives' presence but invited them into her home. Detective Clausi stated that it was her responsibility to "freeze" the defendant's home and preserve any evidence until Detective Warner returned with the search warrant. Detective Clausi confirmed that the defendant left the house in her husband's car and returned home with her teenaged daughter while Detective Clausi and another detective maintained the scene.

Detective Clausi testified that at one point, the defendant asked her daughter, "Did you find that homework?" The defendant then told her she needed to go and find the homework. Detective Clausi testified that her suspicions were aroused by the awkward nature of this conversation. According to Detective Clausi, the daughter went outside to the defendant's car and began looking through it. Detective Clausi followed the daughter outside and observed her as she began searching the car. When the defendant's daughter noticed Detective Clausi watching her, she exited the car and returned inside. Once inside, the defendant asked her daughter if she found the homework and the daughter replied that she had not. Detective Clausi testified that the defendant then told her daughter, "You need to find that homework or you're going to be in trouble." The daughter left and went upstairs. Shortly thereafter, the defendant left the room and followed her daughter upstairs. Detective Clausi testified that Detective Grandy followed the two women upstairs. Moments later, Detective Clausi heard the defendant yelling at Detective Grandy about his attempts to enter the room where they were located. She ran upstairs and saw the defendant and her daughter in the daughter's bedroom. The defendant told the detectives that her daughter was ill and the two went into the adjoining bathroom where they stayed for several minutes before coming back downstairs again.

Detective Kevin Adams testified that he was part of the team that executed the search warrant at the defendant's residence and was assigned to search the upstairs and bathroom area. There was a door from the bathroom to the bedroom concealed from the hallway. After the defendant and her daughter returned downstairs, Detective Adams searched the bathroom and found torn McDonald's

gift certificates and coupons in the bathroom trash can, and the torn and shredded remnants of "paper shavings" were located around the trash can. According to Detective Adams, the coupons and certificates were torn into fine "confetti-like" pieces. Detective Adams also testified that he conducted a search in the kitchen and found scissors and military identification cards in a Kroger bag in the pantry just off the kitchen area.

Mark Hartman testified that he lived two doors down from the defendant. He stated that he ordered a modem from AOL/DSL that he never received. He also never received an expense check from his former employer in the amount of $2,528.56. Mr. Hartman recalled that he was forced to call his employer and request that another check be sent. Mr. Hartman said he was never notified by the defendant that she was in possession of materials belonging to him, and he never gave permission or consent for her to hold his mail or to receive those items on his behalf.

Jack Barnett testified that he was the senior vice-president of sales and business development with American Banknote Company. He stated that his company was responsible for working with other companies, including McDonald's, to produce security documents for use as coupons, gift certificates, traveler's checks, passports, etc. He reviewed the McDonald's coupons found in the defendant's car and testified that they were counterfeit. Specifically, he stated that the type of paper used, the lack of a temperature-adjusting watermark on the back of the document, and the absence of left-side perforations all indicated that the certificates were fraudulent. In addition, Mr. Barnett testified that all certificates issued by his company for a retailer such as McDonald's were sequentially numbered without repeating, and several of the coupons found in the defendant's possession carried duplicate serial numbers. Mr. Barnett testified that the same process was used to determine that a number of Wendy's restaurant certificates found in the defendant's possession were also counterfeit.

Michael Hollowell testified that he is a civilian employee who retired from the Air Force where he worked as an officer in charge of creating and issuing identification and access cards for active duty military, contract employees, retirees, and dependents. He testified that the civilian retirement card issued for the defendant could not be legitimate based upon the defendant's age. He also stated that the card contained other erroneous information, including the defendant's social security number and describing the defendant as "civilian perm" instead of stating her civilian rank. Based on his research using the defendant's social security number, he was unable to determine whether the defendant was ever a civilian employee of the Air Force or any other military branch. Mr. Hollowell testified that with regard to the other "fraudulent" cards found in the defendant's possession, no cards bearing the titles "Mil - Tech Sgt." or "Mil. Active Reservist" with a blue background were issued to active reservists or active duty personnel in the Air Force.

Peggy McKenzie testified that she worked as the accounting manager at Opry Mills mall in 2004 where she oversaw sales related to gift certificates. She stated that her office received new gift certificates in boxes of 250 connected with feeder tracks that could go through a printer. The certificates were all numbered consecutively without repeating. She examined the certificates found at the defendant's residence and testified that two of the certificates were originals, but the remainder

were duplicates. The copies bore repeat serial numbers, did not carry the orange temperature-adjusting security watermark on the back of the certificates, and were printed on a different type of paper.

The defendant's daughter testified that prior to the time her family lived in Franklin, Tennessee, she and the defendant lived in Warner Robins, Georgia and the defendant was employed at the air force base there. She stated that during a family vacation to Florida in 2003, she and another friend copied gift certificates and dollar bills. She also stated that after searching online and finding out that military personnel could get into SeaWorld for free, she and her friend manufactured military identification cards as well. She testified that she and her friend only played with the coupons and identification cards that they made and never intended to actually use them. She identified several trial exhibits, including a number of fake coupons and certificates for Wendy's and McDonald's, as those made by her and her friend. She stated that it was her intent to throw those coupons and certificates away at a later time. She testified that she had never seen the expense check made out to Mark Hartman, and had also never seen the social security statement issued to him. She stated that she had seen the air force civilian identification card in the name of "Cheryl E. Bass" during the time the defendant worked at Trust Company Bank on the air force base. She identified the blue-handled scissors found by detectives as the ones she and her friend had used to cut the identification cards they made. She also identified the illegitimate Opry Mills gift certificates that were found as the ones she and her friend made while "pretending" on vacation. She testified that she cut up the coupons she and her friend made and threw the remains in the trash can. She stated that her mother did not assist her in cutting up those coupons on the day the detectives searched the house.

On cross-examination, the defendant's daughter could not recall exactly what month in 2003 she went on vacation with her family and friend. She also could not recall the name of the hotel that the family stayed in while on vacation. She admitted copying coupons from several restaurant companies, including McDonald's, Taco Bell, Chick Fil-A, Burger King, Pizza Hut, and Friday's. She testified that there were more than fifty certificates or coupons that she stuffed into her suitcase and brought back home with her. She acknowledged that in November there was an incident where her mother attempted to pass fraudulent gift certificates at a local McDonald's. She admitted that she was not at home when police first came to the house to question the defendant in November 2003. She also admitted that she was not in the car with her mother at the time the gift certificates were passed. Even though she previously stated that she had created "about fifty" coupons or certificates while on vacation, she subsequently stated that she and her friend created too many gift certificates for her to tear up between October of 2003 and January 6, 2004, when police searched the house. She also admitted that during the January 6, 2004 search, she and the defendant went upstairs to the bathroom and shut the door to officers. She stated that she pointed out the torn up certificates in the trash can to the defendant while they were secluded in the bathroom, but she maintained that she and the defendant did not destroy those coupons during the police search.

Detective Warner was called on rebuttal by the state and testified that contrary to the testimony given by the defendant's daughter, he interviewed the defendant about the seven

fraudulent McDonald's coupons which had been passed for the first time in November. Detective Warner testified that he first spoke to the defendant in November as a part of his initial investigation into the certificates passed at McDonald's, and the defendant first told him she did not know anything about it. Later, during that same initial conversation, the defendant "remembered" that she had filled out a survey online at savingsregister.com and was permitted to download and print the gift certificates through her AOL account. Detective Warner left the defendant after that first conversation and contacted McDonald's corporate office. He was informed by a company representative that all coupons issued by McDonald's have a unique code and there are no duplicate codes. Furthermore, McDonald's certificates were not available to download and print online. Additional investigation revealed that the defendant lied to Detective Warner, and that the defendant had ordered and shipped the gift certificates to the Bass residence. Detective Warner included the defendant's inconsistent information in the affidavit in support of probable cause for the search warrant.

Michael Hollowell was also called by the state as a rebuttal witness. He testified that there are two banks located on the Warner Robins Air Force Base in Georgia, and the civilian employees of those banks would be given a base access window sticker to place on their vehicles to gain access to the base. According to Mr. Hollowell, civilian bank employees would not receive civilian Air Force identification cards. Mr. Hollowell testified that a civilian employee such as the defendant would receive a parking decal allowing her access to the base, but any other identification card issued to the defendant while she worked at the bank on base would not have been issued by the Air Force.

After deliberation, the jury found the defendant guilty of criminal simulation with a value less than $1,000, guilty of theft of property with a value of $1,000 or more, but less than $10,000, and assessed a fine of $2,500. The jury found the defendant guilty of tampering with the evidence and assessed a fine of $7,500. The jury also found the defendant guilty of forgery and assessed a fine of $3,000. At the sentencing hearing, the court heard testimony from her bail bondsman, Detective Warner, the defendant's husband, and other witnesses that after receiving her convictions, the defendant and her family relocated to Destin, Florida without notifying her bondsman or parole officer. While awaiting sentencing, she was arrested twice, once at Disney World in Orlando for shoplifting hundreds of dollars in children's clothing merchandise and once at Wal-Mart for shoplifting approximately fifteen dollars in food items.

For her convictions, the defendant was sentenced to one year for criminal simulation, a Class E felony; three years for theft, a Class D felony; four years for tampering with evidence, a Class C felony; and one year for forgery, a Class E felony. The defendant was also sentenced to thirty days for driving on a suspended license, a class C misdemeanor.[1] The court ordered the defendant's sentences to be served concurrently for a total effective sentence of four years.

[1] The defendant pled guilty to driving while on a suspended license prior to trial.

After sentencing, the defendant filed a motion for new trial which she amended twice before being heard by the court. At the hearing on the motion, the defendant argued that she was denied due process under the Sixth Amendment and improperly sentenced in violation of *Blakely v. Washington*, 542 U.S. 296 (2004). In addition, the defendant argued that the discovery of new evidence dictated that she be granted a new trial. In support of this claim, the defendant submitted the affidavit of Major Greg Anderson, the current security officer responsible for issuing identification cards at Robins Air Force Base as well as the affidavit of Robins Air Force Elementary School Secretary, Rebecca Carty. Major Anderson was unable to certify that the identification card shown to him by defense counsel was genuine. Ms. Carty stated in her affidavit that the defendant was employed at one time by the Elementary School at Robins Air Force Base. The trial court was unpersuaded that the materiality of this "newly discovered evidence" warranted a new trial and denied the defendant's motion.

ANALYSIS

I. Sufficiency

The defendant argues that the state failed to present sufficient evidence at trial to support her convictions for theft of property, forgery, and tampering with the evidence.[2]

Upon review, we recognize the well-established rule that once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). Therefore, on appeal, the convicted defendant has the burden of demonstrating to the appellate court why the evidence will not support the jury's verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). To meet this burden, the defendant must establish that no "rational trier of fact" could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see State v. Evans*, 108 S.W.3d 231, 236 (Tenn. 2003); *see also* Tenn. R. App. P. 13(e). The jury's verdict, once approved by the trial judge, accredits the state's witnesses and resolves all conflicts in favor of the state. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). The state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. *Carruthers*, 35 S.W.3d at 558. Questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value given to the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). We do not attempt to re-weigh or re-evaluate the evidence. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002).

A. Theft of Property

[2] We note that the defendant does not raise an issue regarding sufficiency of the evidence as it pertains to her conviction for criminal simulation.

The defendant argues that the evidence is insufficient to support a conviction for theft of property because mere possession is not sufficient to establish the existence of theft, and the state failed to prove that the defendant was even aware that those items were in her home.

A person commits theft of property "if, with [the] intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent." Tenn. Code Ann. § 39-14-103. Theft of property is a Class D felony if the value of the property obtained is between $1,000 and $10,000. *See* Tenn. Code Ann. § 39-14-105(3). To deprive is to:

> (A) Withhold property from the owner permanently or for such a period of time as to substantially diminish the value or enjoyment of the property to the owner;
>
> (B) Withhold property or cause it to be withheld for the purpose of restoring it only upon payment of a reward or other compensation; or
>
> (C) Dispose of the property or use it to transfer any interest in it under circumstances that make its restoration unlikely[.]

Tenn. Code Ann. § 39-14-106(a)(8). An "owner," for purposes of the theft statutes, is defined as "a person other than the defendant, who has possession of . . . property . . . and without whose consent the defendant has no authority to exert control over the property." *Id.* § 39-11-106(26). The intent to deprive an owner of property may be established by circumstantial evidence. *See State v. Scales*, 524 S.W.2d 929, 931 (Tenn. 1975). In addition, a "jury may infer a criminal defendant's intent from the surrounding facts and circumstances." *State v. Roberts,* 943 S.W.2d 403, 410 (Tenn. Crim. App. 1996), *overruled on other grounds by State v. Ralph,* 6 S.W.3d 251 (Tenn. 1999).

The jury convicted the defendant of the theft of $1,000 or more but less than $10,000 based upon the discovery of her neighbor's stolen reimbursement check and computer modem in the defendant's home. Detectives discovered a check for $2,528.56 issued to Mark Hartman and a computer modem with a packing slip bearing his name in the defendant's home. The record demonstrates that detectives found the box containing the modem inside another box and hidden on top of a stack of boxes in a closet. It is apparent that the defendant "exercised control" over the modem by placing it and the box it came in, inside another box and concealing it on top of a stack of boxes. *See* Tenn. Code Ann. § 39-14-103. Mr. Hartman's reimbursement check was found at the defendant's computer desk, along with the social security statement containing his social security number and other identifying information. This information could be used to assume his identity, cash his reimbursement check, or achieve some other form of fraud. Mr. Hartman testified that he never gave the defendant permission to receive his mail or to hold these items on his behalf. *See* Tenn. Code Ann. § 39-11-106(26). Mr. Hartman's items were found in a search that also yielded fraudulent identification cards, coupons and gift certificates. Accordingly, the intent required for theft could be inferred by the jury based on the facts and circumstances surrounding the search of her residence. *See Roberts,* 943 S.W.2d at 410.

In addition, the defendant argues that the value of the property was not greater than $1,000. However, the state correctly asserts that in the absence of any evidence to establish a lesser value, "the face amount of the instrument [i.e. check] is presumptive evidence of its value." *State v. Evans*, 669 S.W.2d 708, 712 (Tenn. Crim. App. 1984). Because the amount on the check to Mr. Hartman was in excess of $2,000, sufficient evidence existed to support the defendant's conviction for theft in an amount greater than $1,000. Therefore, the defendant is without relief as to this issue.

B. Forgery

The defendant next argues that there was insufficient evidence to support a conviction for forgery because there was no proof that she intended to use the civilian identification card found in her purse for any illicit purpose.

The Tennessee statute pertaining to forgery provides in pertinent part:

> (a) A person commits an offense who forges a writing with intent to defraud or harm another.
>
> (b) As used in this part, unless the context otherwise requires:
>
> (1) "Forge" means to:
>
> (A) Alter, make, complete, execute or authenticate any writing so that it purports to:
>
> (I) Be the act of another who did not authorize that act;
>
> (ii) Have been executed at a time or place or in a numbered sequence other than was in fact the case; or
>
> (iii) Be a copy of an original when no such original existed;
>
> . . . .
>
> (C) Issue, transfer, register the transfer of, pass, publish, or otherwise utter a writing that is forged within the meaning of subdivision (b)(1)(A); or
>
> (D) Possess a writing that is forged within the meaning of subdivision (b)(1)(A) with intent to utter it in a manner specified in subdivision (b)(1)(C); and
>
> (2) "Writing" includes printing or any other method of recording information, money, coins, tokens, stamps, seals, credit cards, badges, trademarks, and symbols of value, right, privilege or identification.

Tenn. Code Ann. § 39-14-114.

The search conducted by detectives produced one expired, but originally valid civilian Air Force identification card. Several reproductions of this card were also found by detectives during their search of the defendant's residence. Michael Hollowell testified that these reproductions were not valid. Among the forged identification cards were cards of various active military designations that would entitle the bearer to benefits and discounts at a base exchange, while a civilian card would not permit those benefits or discounts to the cardholder. Tenn. Code Ann. § 39-14-114(b)(1)(D). In addition, detectives found coupons and certificates for restaurants, stores and other vendors which were clearly copies and which, in some cases, bore repeat serial numbers. Tenn. Code Ann. § 39-14-114(b)(1)(A)(I)-(iii). These items, combined with the other counterfeit coupons and certificates found in the defendant's car and home provide a sufficient factual and circumstantial basis to establish that the defendant possessed the requisite intent to "defraud or harm" others by deriving a monetary benefit from using the cards. Tenn. Code Ann. § 39-14-114. Therefore, the defendant is without relief as to this issue.

C. Tampering with the Evidence

The defendant argues that the evidence was insufficient to sustain a conviction for "tampering with the evidence." Tennessee law states "[i]t is unlawful for any person, knowing that an investigation or official proceeding is pending or in progress, to: (1) [a]lter, destroy, or conceal any record, document or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding . . ." Tenn. Code Ann. § 39-16-503. "'Destroy' is a verb that means to ruin or to put out of existence . . . . For something to be destroyed within the context of [Tenn. Code Ann.] § 39-16-503, its evidentiary value must be ruined." *State v. Logan,* 973 S.W.2d 279, 282 (Tenn. Crim. App. 1998). A bill of particulars supplied by the state alleges that the defendant destroyed counterfeit McDonald's coupons while police were conducting a search of her residence on January 6, 2004.

When viewed in a light most favorable to the state, the evidence establishes that police officers "froze" the scene in order to prevent the destruction of evidence while they obtained a search warrant for the defendant's home. At one point during the search, the defendant and her daughter went upstairs to the daughter's bedroom which had an adjoining bathroom. The two closed themselves in the bedroom and while in the bathroom, prevented detectives from entering for several minutes. A subsequent search of the bathroom revealed a bag containing the torn and shredded remains of several counterfeit coupons and certificates. Detective Adams testified that the remains of the coupons found in and around the bathroom trash can were in "confetti-like pieces." Accordingly, there was sufficient evidence to establish that the defendant "destroyed" evidence of counterfeit gift certificates while detectives were conducting a search of her home. *See id*. The defendant is without relief as to this issue.

II. Newly Discovered Evidence

The defendant contends that the trial court erred and denied her due process in violation of the Fourteenth Amendment by failing to grant a new trial on the basis of newly discovered evidence. Specifically, the defendant argues that affidavits from witnesses establish her qualifications for possessing a civilian air force identification card and directly contradict the materially false testimony of the state's witness, Michael Hollowell, who stated that the defendant never worked on a military base.

We begin by noting that the "standard of review is abuse of discretion." *State v. Meade*, 942 S.W.2d 561, 565 (Tenn. Crim. App. 1996) (citing *Hawkins v. State*, 417 S.W.2d 774, 778 (Tenn. 1967). To be entitled to a new trial on the basis of newly discovered evidence, a defendant must show: (1) that he or she used reasonable diligence in seeking the newly discovered evidence; (2) that the new evidence is material; and (3) that the new evidence will likely change the result of the trial. *State v. Nichols*, 877 S.W.2d 722, 737 (Tenn. 1994) (citing *State v. Goswick*, 656 S.W.2d 355, 358-360 (Tenn. 1983)). The decision to grant a new trial on the basis of newly discovered evidence lies within the sound discretion of the trial court. *See State v. Caldwell*, 977 S.W.2d 110, 117 (Tenn. Crim. App. 1997); *State v. Goswick*, 656 S.W.2d 355, 358 (Tenn. 1983). In addition, a new trial will not be granted if it appears that the newly discovered evidence merely discredits the statements of a witness or impeaches the witness unless the testimony which is being impeached was so important and the impeaching evidence so convincing that a different result must occur. *Rosenthal v. State*, 292 S.W.2d 1, 4-5 (Tenn. 1956).

The defendant's claim fails the first prong of the *Nichols* test, that she used reasonable diligence to obtain the new evidence. *Nichols*, 877 S.W.2d at 737 (Tenn. 1994). The defendant was well aware of her own employment history and could have exercised due diligence prior to or during trial to obtain documentation or other evidence supporting her employment record. Similarly, there was no circumstance which prohibited her or her counsel from contacting the current security officer at Warner Robins Air Force Base to establish her qualifications for possessing a civilian Air Force identification card.

The defendant's claim also fails the second prong of the *Nichols* test, materiality. *Id*. The issue in the instant case was not whether the defendant was in lawful possession of an older yet valid identification card, but why she was in possession of other forged cards modeled on that valid, original card. Michael Hollowell testified that the remaining identification cards were forgeries because the dates listed on those cards did not make the defendant eligible for retirement as stated, or because the design of the cards were of the wrong type for actively enlisted military personnel of the rank and position indicated on those cards. Mr. Hollowell did not testify, as asserted by the defendant, that the defendant's original card was a forgery because she was never employed by the military. He testified that he was unable to determine whether the original card was genuine or a forgery or whether the defendant was employed by the military based solely upon the information contained on the card. Because Mr. Hollowell did not offer materially false testimony that the defendant did not work for the Air Force in any capacity, there is no evidence of a due process violation against the defendant as alleged. Even if Mr. Hollowell had offered testimony that the

defendant "never" worked on the Air Force base, the issue of the defendant's past employment would still not be material to the issue of whether or not she used a legitimately issued civilian identification card to create several other counterfeit cards. Therefore, there is no due process violation and no basis for the grant of a new trial.

The defendant's argument also fails the third and final prong of the *Nichols* test, namely, that newly discovered evidence would change the outcome of the trial. *Id*. The defendant contends that the affidavits of Secretary Rebecca Carty and Major Greg Anderson, the current security officer responsible for issuing identification cards at Robins Air Force Base, are evidence of the defendant's past employment on the base, and demonstrate her qualifications for possessing a civilian identification card. The state correctly asserts, however, that the affidavit of Major Greg Anderson does not contradict the testimony of Michael Hollowell. In his affidavit, Major Anderson states, "I cannot conclusively say that the identification card noted in Exhibit 7 is genuine." Once again, the affidavits issued by Major Anderson or Rebecca Carty are not relevant to the validity of the remaining cards, and therefore are not material to the issue of whether the additional cards are counterfeit or were created by the defendant with "the intent to defraud or harm another." Tenn. Code Ann. § 39-14-114. Therefore, there is no evidence to support the defendant's argument that this "newly discovered evidence" would change the outcome of the trial. In the words of the trial court, "[e]ven if it is considered newly discovered evidence . . . it merely tends to either impeach or contradict the testimony of the state's witnesses, and does not justify a granting of a new trial." *See Rosenthal v. State*, 292 S.W.2d 1, 4-5 (1956). Therefore, the defendant is not entitled to relief with regard to this issue.

III. Jury Instructions

The defendant argues that the trial court failed to instruct the jury on consideration of expert witness testimony. In addition, the defendant contends that the trial court failed to adequately instruct the jury to consider evidence of each indicted offense separately.

It should first be noted that the record does not show that defendant requested any specialized jury instructions at trial regarding expert witness testimony. A review of the record also does not demonstrate that the defendant made a contemporaneous objection at trial to the instructions read to the jury by the trial court.[3] Tennessee Rule of Appellate Procedure 36(b) states, "[n]othing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." "Indeed, it is well-settled that a litigant 'will not be permitted to take advantage of errors which he himself committed, or invited, or induced the trial court to commit, or which were the natural consequence of his own neglect or misconduct.'" *State v. Robinson*, 146 S.W.3d 469, 493 (Tenn. 2004) (quoting *Norris v. Richards*, 193 Tenn. 450, 246 S.W.2d 81, 85 (1952)); *see also State v.*

[3] Upon review of the record, we note that the trial court instructed the jury as to each separately charged offense.

Smith, 24 S.W.3d 274, 279-80 (Tenn. 2000); Tenn. R. App. P. 36(a). Accordingly, the issues related to jury instructions are waived.

IV. Suppression of Evidence

The defendant challenges the trial court's denial of her motion to suppress evidence. The defendant contends that evidence seized by detectives from her home was obtained in violation of the Fourth Amendment to the United States Constitution and article 1, section 7 of the Tennessee Constitution. Specifically, the defendant argues that police detectives did not have sufficient probable cause to remain in her home without a warrant and that their continued unlawful presence tainted any evidence seized pursuant to their later-obtained warrant. The defendant also argues that the search warrant was invalid because the affidavit supporting the issuance of the warrant under which the evidence was seized did not established probable cause to search her home.

When reviewing the trial court's decision on a motion to suppress, the court conducts a de novo review of the trial court's conclusions of law and application of law to facts. *See State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001). However, the trial court's findings of fact are presumed correct unless the evidence contained in the record preponderates against them. *See State v. Daniel*, 12 S.W.3d 420, 423 (Tenn. 2000). "Questions of the credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *State v. Lawrence*, 154 S.W.3d 71, 75 (Tenn. 2005) (quoting *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). Moreover, the prevailing party is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence. *State v. Hicks*, 55 S.W.3d 515, 521 (Tenn. 2001). In evaluating the trial court's ruling on a motion to suppress, this court "may consider the proof adduced both at the suppression hearing and at trial." *State v. Henning*, 975 S.W.2d 290, 299 (Tenn. 1998).

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

A similar guarantee is provided in article 1, section 7 of the Tennessee Constitution:

> That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty.

The essence of these constitutional protections is "to 'safeguard the privacy and security of individuals against arbitrary invasions of government officials.'" *State v. Downey*, 945 S.W .2d 102, 106 (Tenn. 1997) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528, 87 S.Ct. 1727, 1730 (1967)). As a result, warrantless searches and seizures inside a residence are presumed to be unreasonable. *Payton v. New York*, 445 U.S. 573, 586 (1980). "Even though a felony has been committed and officers have probable cause to believe that they will locate incriminating evidence inside a residence, a warrantless entry to search for contraband or weapons is unconstitutional absent exigent circumstances." *State v. Carter*, 160 S.W.3d 526, 531 (Tenn. 2005) (citing *Payton*, 445 U.S. at 587-588).

The issue central to our review is whether, after being initially invited into the defendant's home, the defendant revoked consent for the police detectives' continued presence inside her home by asking them to leave. At the suppression hearing prior to trial, Detective Warner testified that the defendant did not ask him and Detective Clausi to leave, but that if she had done so, then he would have left. He further testified that it was his belief that he and Detective Clausi were still present in the defendant's home by consent and at her invitation, even after the defendant refused access to her computer, became confrontational and stated that she "wanted to make things as difficult as possible for [him]." Detective Warner expressly denied that the defendant asked him to leave at any time. He also denied that the defendant's husband asked him to leave at any time. Subsequently, the defendant's husband, Mr. D'Angelo, testified that he did in fact tell the police detectives to leave their home. He further testified that Detective Warner refused to leave until the defendant had satisfactorily answered his questions. According to Mr. D'Angelo's testimony, after Detective Warner refused to leave, Mr. D'Angelo went to retrieve a camcorder so that he could film the detectives as they told him they were not going to leave. Mr. D'Angelo stated that Detective Warner told him not to retrieve the camcorder because of the possibility that it could contain evidence. The defendant testified at the suppression hearing and also stated that the police detectives were instructed to leave, and after refusing, blocked her husband's attempts to document their refusal to leave on his camcorder.

The trial court made several findings on the record in support of its denial of the defendant's motion. The trial court found that the detectives sufficiently explained who they were and why they were at her house and that the defendant invited them into her home to discuss the issue. The court also found that even after the defendant became confrontational, no request to leave was made. "I find that . . . she at no point told the detective to leave, and that when they asked her for her computer after she gave them yet another explanation, she refused." The court stated that it did not find either the defendant or her husband's testimony credible and stated for the record:

> I find that her husband is completely not credible, don't believe much of anything he told me. Nor do I believe what she told me. She was not in custody. She was not arrested. She was not detained and the statements she made were [made] voluntarily and they will not be suppressed. That will be my order.

The court also held that any statements made by the defendant while Detective Warner and Detective Clausi were in her home at her invitation were voluntary and admissible at trial. The trial court also

held that the "freezing" or seizure of the defendant's house by detectives was proper, and that the defendant's freedom to leave or move about was in no way affected at any time.

The trial court's findings of fact are presumed correct unless the evidence contained in the record preponderates against them. *See Daniel*, 12 S.W.3d at 423. The court at the suppression hearing was in the best position to determine the credibility of the witnesses and the weight and value of the evidence. *See Lawrence*, 154 S.W.3d at 75. Because the state prevailed at the suppression hearing, it is entitled to "the strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence." *See Hicks*, 55 S.W.3d at 521. Therefore, we conclude that the detectives were present in the defendant's home at her invitation, and that the defendant did not ask the detectives to leave, or otherwise revoke consent. Therefore, the continued presence of the detectives in the defendant's home while Detective Warner obtained a search warrant was valid. However, our analysis does not end here.

Although the detectives were present with the presumed continued consent of the defendant, we must still consider further whether the police properly secured the premises pending issuance and arrival of the search warrant. The United States Supreme Court has said that a warrantless seizure by restraining an individual from entering his home until a search warrant is obtained may be permissible if certain circumstances exist. *Illinois v. McArthur*, 531 U.S. 326, 332 (2001); *see also State v. Stacy N. Mooneyhan*, No. M2006-01330-CCA-R3-CD, 2007 WL 3227066, at *8 (Tenn. Crim. App. at Nashville, Oct. 30, 2007) *appeal dismissed* (Tenn. Jan. 18, 2008).

> In *McArthur* . . . the police officer asked the defendant for permission to search the house and was denied consent. The officer dispatched another officer to obtain a warrant. The officer who remained behind told the defendant, who was on the porch, that he could not reenter the home without an officer present. The defendant was allowed to go inside to make telephone calls and retrieve cigarettes, and while he did so, an officer stood in the doorway. The search warrant arrived and was executed.

Mooneyhan, 2007 WL 3227066, at *8. The Supreme Court stated that the situation called for a balancing of privacy concerns with law enforcement interests to determine whether the intrusion had been reasonable. *Id*. The Court set forth its balancing test as follows:

> In balancing those concerns, the Court looked to four factors: (1) probable cause to believe the home contained evidence of a crime, (2) "good reason" to believe the defendant, unless restrained, would destroy the evidence, (3) reasonable efforts made to reconcile the needs of law enforcement with the demands of personal privacy, and (4) a restraint imposed for a limited period of time.

Id. (citing *McArthur,* 531 U.S. at 332-33). The Court held that temporary restraint "was a reasonable seizure" necessary "to preserve evidence." *Id*. The United States Supreme Court has previously held that "securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents." *Segura v. United States*, 468 U.S. 796 (1984).

In the instant case, the detectives had information from McDonald's employees, inconsistent statements from the defendant herself about the manner in which she obtained the certificates in question, and verification from the restaurant company and certificate manufacturer that it was impossible for the defendant to have obtained the certificates as she claimed. The detectives had "good reason" to believe the defendant would destroy evidence in her home, namely any other counterfeit certificates as well as any evidence contained in her computer. After announcing their intention to "freeze" the home, police detectives stated that individuals at the defendant's home were free to come and go as they pleased and were not detained at that time or restricted access from any part of their home, thereby reconciling the needs of law enforcement with the demands of personal privacy. The degree of freedom afforded the defendant in this circumstance was even greater than that of the defendant in *Mooneyhan*. *See Mooneyhan,* 2007 WL 3227066, at *8. Finally, the restraint or seizure, such that it was, lasted only long enough for Detective Warner to return with the search warrant. Nothing in the record suggests that the brief period of time was longer than required by police detectives to obtain the warrant and return. Therefore, the temporary restraint, or seizure in this case was reasonable and necessary to preserve evidence while the warrant was obtained. *McArthur*, 531 U.S. at 333.

Although we conclude that any evidence obtained was not tainted by the warrantless seizure of the defendant's home and car, we must also determine whether the affidavit supporting the issuance of the warrant under which the evidence was seized established probable cause to seize and search the defendant's residence. *See State v. Carter,* 160 S.W.3d 526, 533 (Tenn. 2005). In reviewing the existence of probable cause for issuance of a warrant, we may consider only the affidavit and may not consider any other evidence known by the affiant or provided to or possessed by the issuing magistrate. *Henning*, 975 S.W.2d at 295; *see also Carter,* 160 S.W.3d at 533. In addition, an affidavit may contain hearsay information supplied by a confidential informant to establish probable cause. *Henning*, 975 S.W.2d at 294-95. Information provided by a citizen-informant who is known to the affiant is presumptively reliable. *State v. Stevens*, 989 S.W.2d 290, 293 (Tenn. 1999). The reliability of the information of a citizen-informant whose identity is not disclosed is to be determined from the circumstances and the affidavit in its entirety. *State v. Melson*, 638 S.W.2d 342, 356 (Tenn. 1982); *see also State v. Carter,* 160 S.W.3d 526 (Tenn. 2005).

Upon review, it is apparent that the search warrant affidavit establishes the facts of the incident, namely the time and date that an individual matching the defendant's description used seven counterfeit $1.00 gift certificates to pay for food at a McDonald's restaurant in Franklin, Tennessee. Furthermore, it also establishes that employees at the McDonald's restaurant identified the make, model, and license plate number of the vehicle driven by the suspect, and also stated that the defendant was a frequent customer. Computer records revealed that the tag number of the vehicle was registered to the defendant at her home address. The affidavit also contained the following information:

> The affiant spoke with [the defendant] on November 5, 2003 at 1:15 p.m. and [the defendant], after first denying the involvement, later stated that she had downloaded and printed the gift certificates from savingsregister.com from her AOL

account. On November 11, 2003, McDonald's Corporate Office in Oak Brook, Illinois advised this affiant that all certificates have a unique code and there are no duplicate codes. In addition, certificates are not available to download and print on-line.

American Bank Note of Franklin, Tennessee is the printer of all McDonald's gift certificates. On November 14, 2003, at 10:30 a.m., Mr. Barnett of American Bank Note inspected the seized gift certificates and verified that they were fraudulently produced on a color printer. Mr. Barnett also noted that the seized certificates contained numbering that would have been included in one single booklet. No security features were included on the seized certificates. Mr. Barnett confirmed that the original booklet was purchased, via the Internet, by Allen Levy of New York, New York and shipped on September 24, 2003 to Steed F.C. to the attention of Neal Gray in Garland, Texas.

Subsequent conversation and follow-up with Gray revealed the eight one-dollar McDonald's gift certificates were shipped to the [defendant's] residence at [defendant's address].

On January 6, 2004, this affiant again spoke with the [defendant] who now stated that she had received the counterfeit certificates in the mail after completing computer surveys. [The defendant] refused consensual access to her computer.

The affidavit concludes by listing Detective Warner's qualifications as a detective, including his years in service and years as a detective. He confirmed that as the affiant, he had interviewed the named parties in the affidavit, including the suspect.

The information supplied in the affidavit supports probable cause for the search warrant. The affidavit contained independently verifiable information regarding the facts and circumstances of the passing of the counterfeit certificates, not just conclusory allegations by the affiant. *See Jacumin*, 778 S.W.2d at 432. It also referenced the testimony of reliable "citizen-informants," the McDonald's employees in this case. *See Henning*, 975 S.W.2d at 294-95. The affiant's verification of the certificates as counterfeit with an expert, as well as verification of certificates shipped to the defendant through the mail also provide independent bases upon which a magistrate, when viewing the affidavit alone, would find probable cause. *See Henning*, 975 S.W.2d at 294 (citing *State v. Bryan*, 769 S.W.2d 208, 210 (Tenn.1989)). Furthermore, the cumulative nature of the evidence, as well as the defendant's change of story, provide "reasonable grounds for suspicion, supported by circumstances indicative of an illegal act." *See State v. Stevens*, 989 S.W.2d 290, 293 (Tenn. 1999). Accordingly, ample probable cause existed to support the issuance of a search warrant for the defendant's house and vehicle. Therefore, the search warrant was valid, the police detectives had sufficient probable cause for a search, and the evidence recovered from the defendant's home was admissible. The defendant is without relief as to this issue.

V. Suppression of Defendant's Statement

The defendant argues that the trial court erred by not suppressing her statements to authorities because she was in custody at the time she made those statements and had not been given *Miranda* warnings.

In reviewing a trial court's determinations regarding a suppression hearing, "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). Thus, "a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." *Id.* Nevertheless, appellate courts will review the trial court's application of law to the facts purely de novo. *See State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001). Furthermore, the state, as the prevailing party, is "entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence." *Odom*, 928 S.W.2d at 23. Moreover, we note that "in evaluating the correctness of a trial court's ruling on a pretrial motion to suppress, appellate courts may consider the proof adduced both at the suppression hearing and at trial." *State v. Henning*, 975 S.W.2d 290, 299 (Tenn. 1998).

In *Miranda v. Arizona*, the United States Supreme Court held that statements made during the course of a custodial police interrogation are inadmissible at trial unless the state establishes that the defendant was advised of his right to remain silent and his right to counsel and that the defendant then waived those rights. *Miranda v. Arizona*, 384 U.S. 436, 471-75 (1966); *see also Dickerson v. United States*, 530 U.S. 428 (2000); *Stansbury v. California*, 511 U.S. 318, 322 (1994). However, the Court limited its holding to a "custodial interrogation." *Miranda*, 384 U.S. at 478-479. "Custodial interrogation" was defined by the Court as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444. A person is "in custody" within the meaning of the *Miranda* if there has been "a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler,* 463 U.S. 1121, 1125 (1983). The Court has refused to extend the holding in *Miranda* to non-custodial interrogations. *See Oregon v. Mathiason*, 429 U.S. 492 (1977) (holding that an accused's confession was admissible because there was no indication that the questioning took place in a context where his freedom to depart was restricted in any way); *Beheler*, 463 U.S. at 1124-25 (noting that the ultimate inquiry is whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest).

The Tennessee Supreme Court has identified several factors relevant to a determination of whether or not a suspect or defendant has been subjected to a custodial interrogation:

> Some factors relevant to that objective assessment include the time and location of the interrogation; the duration and character of the questioning; the officer's tone of voice and general demeanor; the suspect's method of transportation to the place of questioning; the number of police officers present; any limitation on movement or other form of restraint imposed on the suspect during the interrogation; any interactions between the officer and the suspect, including the words spoken by

> the officer to the suspect, and the suspect's verbal or nonverbal responses; the extent to which the suspect is confronted with the law enforcement officer's suspicions of guilt or evidence of guilt; and finally, the extent to which the suspect is made aware that he or she is free to refrain from answering questions or to end the interview at will.

State v. Anderson, 937 S.W.2d 851, 855 (Tenn. 1996).

We agree that the evidence does not preponderate against the trial court's finding that the defendant was not in custody at the time she made statements to police officers. Detectives Warner and Clausi went to the defendant's home, knocked, identified themselves and asked to speak with the defendant. She was not arrested. The defendant invited the detectives into her home to speak with them. After asking a few questions, the defendant indicated her intent to make things "as difficult as possible," and refused consent for a search of her computer. However, the defendant was free to come and go as she pleased. At one point the defendant left and went and picked her daughter up at school. There is no indication that the questioning of the defendant took place in a context where her freedom to depart was restricted in any way. *See Mathiason*, 429 U.S. at 495; *see also Anderson*, 937 S.W.2d at 855. Therefore, the defendant is not entitled to relief on this issue.

VI. Sentencing

The defendant challenges the length of sentence imposed by the trial court, the denial of alternative sentencing, and the imposition of fines.

When a defendant challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (2006); *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *Ashby*, 823 S.W.2d at 169. When conducting a de novo review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the appellant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210 (2006); *Ashby*, 823 S.W.2d at 168. However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. *Ashby*, 823 S.W.2d at 169 (Tenn. 1991). Furthermore, we emphasize that facts relevant to sentencing must be established by a preponderance of the evidence and not beyond a reasonable doubt. *State v. Winfield*, 23 S.W.3d 279, 283 (Tenn. 2000) (citing *State v. Carico*, 968 S.W.2d 280 (Tenn. 1998)). The party challenging a sentence bears the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

A. Length of Service

The defendant first contends that her sentences for tampering with the evidence and theft of property more than $1,000 but less than $10,000 were unconstitutionally enhanced in violation of *Blakely v. Washington*, 542 U.S. 296 (2004). Each sentence was enhanced one year above the minimum term for the offense, for a total of three years for the theft of property, and a total of four years for tampering with the evidence. As stated previously, the defendant was sentenced to a total effective sentence of four years and was indicted on the charges leading to her convictions in 2004. The defendant's sentences were imposed by the trial court in 2006, after enactment of the 2005 amendment. This appeal pertains to sentencing law subsequent to Tennessee's Criminal Sentencing Reform Act of 1989 ("the Reform Act") but prior to its amendment in 2005, which established a "presumptive sentence" for each class of felonies other than capital murder. Prior to 2005, absent enhancing or mitigating factors, the presumptive sentence for Class B, C, D, or E felonies was the minimum in the applicable range. Tenn. Code Ann. § 40-35-210(c) (Supp. 2001). The defendant specifically objected to application of enhancement factors in violation of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and as addressed in *Blakely v. Washington*, 542 U.S. 296 (2004).

In *Blakely*, the United States Supreme Court concluded that the "'statutory maximum' for [sentencing] purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 542 U.S. at 303; (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). In *Blakely*, the Court held that "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Id*. at 301. Subsequent to that decision, our supreme court decided *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005) (*Gomez I)*, in which a majority of the court concluded that, unlike the sentencing scheme in *Blakely*, "Tennessee's sentencing structure does not violate the Sixth Amendment." *Gomez*, 163 S.W.3d at 661. However, the United States Supreme Court vacated our supreme court's ruling in *Gomez I* and remanded the case for reconsideration in accordance with its decision in *Cunningham v. California*, 549 U.S. ----, 127 S. Ct. 856 (2007). In light of the remand, the Tennessee Supreme Court concluded that the 1989 Reform Act failed to satisfy the Sixth Amendment insofar as it allowed a presumptive sentence to be enhanced based on judicially determined factors other than prior criminal convictions. *State v. Gomez,* No. M2002-01209-SC-R11-CD, --- S.W.3d ----, 2007 WL 2917726 (Tenn., Oct. 9, 2007) (*Gomez II)*. Accordingly, the Blakely analysis applies to the defendant's case.

The record reflects that the trial court applied an enhancement factor for the defendant's prior convictions and criminal behavior. Tenn. Code Ann. § 40-35-114(2) (2004). The court also applied an enhancement factor for the defendant's failure to comply with the conditions of her release into the community based on the defendant's shoplifting arrests in Florida while she awaited sentencing on her convictions in the instant case. Tenn. Code Ann. § 40-35-114(8) (2004). In accordance with our supreme court's decision in *Gomez II*, the trial court, when acting under the authority of the 1989 Reform Act, is no longer able to enhance the defendant's sentences based upon judicially determined factors other than prior criminal convictions, unless those factors were found by the jury or admitted

to by the defendant. *State v. Gomez,* No. M2002-01209-SC-R11-CD, --- S.W.3d ----, 2007 WL 2917726 (Tenn., Oct. 9, 2007).

Although the court erred by applying enhancement factor eight (8), that the defendant failed to comply with the conditions of her release into the community while awaiting sentencing, we conclude, based upon our de novo review, that the defendant's sentences were properly enhanced based on her "previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range." *Id*.; *see also* Tenn. Code Ann. § 40-35-114(2) and (8) (2004). In addition to her convictions in this case, the defendant pled guilty to a misdemeanor charge for driving without a license prior to trial. She also pled no contest to petty theft in 2004 in Florida and was placed on six months probation, which she completed. "*Blakely* . . . does not preclude a sentencing court's consideration of the defendant's prior convictions as an enhancement factor in determining the length of the defendant's sentence." *State v. Hall*, No. M2003-02326-CCA-R3-CD, 2005 WL 292432 at * 15 (Tenn. Crim. App. at Nashville, Feb. 8, 2005) (citing *Blakely,* 542 U.S. at 301). The defendant's sentences were properly enhanced by one year based upon her prior criminal convictions. Therefore, she is not entitled to relief on this issue.

B. Manner of Service

The defendant next argues that the trial court erred by denying some form of alternative sentencing, including split confinement or probation instead of imposing confinement for the entire sentence.

The task of an appellate court when reviewing the length, range, or manner of service of a sentence, including the grant or denial of probation, is to conduct a de novo review with a presumption that the lower court was correct. Tenn. Code Ann. § 40-35-401(d)(1990). This presumption is conditioned "upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). A defendant is presumed to be a favorable candidate for alternative sentencing if he or she is an especially mitigated or standard offender convicted of a Class C, D, or E felony and there exists no evidence to the contrary. Tenn. Code Ann. § 40-35-102(6); *see also State v. Davis*, 940 S.W.2d 558, 559 (Tenn. 1997).

A trial court shall automatically consider probation as a sentencing alternative for eligible defendants. Tenn. Code Ann. § 40-35-303(b). A trial court must also presume favorable candidacy for alternative sentencing unless it is presented with evidence sufficient to overcome this presumption. *See Ashby*, 823 S.W.2d at 169. The presumption in favor of alternative sentencing may be overcome by facts contained in the pre-sentence report, evidence presented by the state, the testimony of the accused or a defense witness, or any other source, provided it is made part of the record. *State v. Parker*, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996). Guidance as to whether the trial court should grant alternative sentencing or incarcerate is found in Tennessee Code Annotated section 40-35-103. Sentences involving confinement should be based upon the following considerations:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or;
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant . . .

Tenn. Code Ann. § 40-35-103(1)(A)-(C). As part of its determination, the trial court may also consider the defendant's potential or lack of potential for rehabilitation. *Id*. § 40-35-103(5). There is no mathematical equation to be utilized in determining sentencing alternatives. Not only should the sentence fit the offense, but it should fit the offender as well. *Id*. 40-35-103(2); *see State v. Boggs*, 932 S.W.2d 467, 476-77 (Tenn. Crim. App. 1996).

Upon review of the record, the trial court stated that it considered the defendant's favorable candidacy for alternative sentencing based on statute. *See* Tenn. Code Ann. § 40-35-102. In addition, the court also stated that it gave consideration to the factors involving confinement. *See* Tenn. Code Ann. § 40-35-103. The court noted that the defendant had successfully completed probation before; therefore, that fact was not considered in assessing the defendant's suitability for confinement in the instant case. The court addressed the defendant's potential for personal, medical rehabilitation and noted that while argument was advanced by the defendant's family that the she "has needed help for years," no "competent medical mental health-type proof" existed to convince the court that she would benefit from any type of rehabilitation or treatment.

Review of the trial court's statements at the sentencing hearing reveals that the trial court expressly based its decision to impose total confinement upon Tennessee Code Annotated section 40-35-103(1)(B), that "[c]onfinement is necessary to avoid depreciating the seriousness of the offense." *Id*. The court also indirectly articulated a need for deterrence based on the second half of that provision as justification for imposition of confinement. *Id*. To the extent the trial court based its denial of alternative sentencing on the need to avoid depreciating the seriousness of the offense, if the seriousness of the offense forms the basis for the denial of alternative sentencing, "the circumstances of the offense as committed must be 'especially violent, horrifying, shocking, reprehensible, offensive or otherwise of an excessive or exaggerated degree,' and the nature of the offense must outweigh all factors favoring a sentence other than confinement." *State v. Grissom*, 956 S.W.2d 514, 520 (Tenn. Crim. App. 1997) (internal quotations omitted); *see also State v. Hartley,* 818 S.W.2d 370, 374-75 (Tenn. Crim. App. 1991).

As stated previously, our review of the trial court's sentencing decision is conditioned upon a presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn.1991). The presumption of correctness is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *Id*. We note that in this case, the court failed to articulate with specificity its findings of fact regarding its balancing of

the defendant's potential for rehabilitation against the seriousness of the offense. Therefore, our review is de novo without a presumption of correctness. *See id*.

Under our de novo review, we first note that the record demonstrates that the defendant involved her daughter, a minor, in the creation, concealment and destruction of evidence. The record reflects that the trial court was particularly troubled by the defendant's involvement of her daughter. Second, the record reflects that more than fifty counterfeit certificates were found in the defendant's car and home. Third, although the defendant successfully completed probation for her theft conviction in 2004, the nature of her conviction in 2004 is sufficiently similar to the offenses in the instant case. Her criminal record demonstrates a lack of amenability to rehabilitation. Therefore, the defendant is not a suitable candidate for alternative sentencing and the presumption in favor of alternative sentencing has been overcome. *Parker*, 932 S.W.2d at 958. While reasonable minds may differ on the proper application of this factor in this case, we concur with the trial court's findings and conclude that the defendant's criminal behavior was sufficiently excessive and outweighed all positive factors favoring an alternative sentence. Accordingly, the defendant is not entitled to relief.

With regard to the court's consideration of general deterrence, we note that this ground requires a minimal showing of evidence in the record that "would enable a reasonable person to conclude that (1) deterrence is needed in the community, jurisdiction, or state; and (2) the defendant's incarceration may rationally serve as a deterrent to others similarly situated and likely to commit similar crimes." *State v. Hooper*, 29 S.W.3d 1, 13 (Tenn. 2000); *see also State v. Trotter*, 201 S.W.3d 651, 656 (Tenn. 2006). In *Hooper*, the appellate court listed five additional factors that should be considered in order to justify confinement on the basis of deterrence:

> [I]n order to facilitate more meaningful appellate review, and to ensure greater consistency in this aspect of sentencing, trial courts should consider factors, such as the following, when deciding whether a need for deterrence is present and whether incarceration is "particularly suited" to achieve that goal:
>
> 1) Whether other incidents of the charged offense are increasingly present in the community, jurisdiction, or in the state as a whole . . .
>
> 2) Whether the defendant's crime was the result of intentional, knowing, or reckless conduct or was otherwise motivated by a desire to profit or gain from the criminal behavior . . .
>
> 3) Whether the defendant's crime and conviction have received substantial publicity beyond that normally expected in the typical case . . .
>
> 4) Whether the defendant was a member of a criminal enterprise, or substantially encouraged or assisted others in achieving the criminal objective . . .

> 5) Whether the defendant has previously engaged in criminal conduct of the same type as the offense in question, irrespective of whether such conduct resulted in previous arrests or convictions . . .

See Hooper, 29 S.W.3d at 10-12 (emphasis omitted).

Although the trial court did not expressly identify deterrence as defined in the latter portion of Tennessee Code Annotated section 40-35-103(1)(B) as a basis for its determination, the court described the defendant's behavior as "reprehensible" and stated that to grant alternative sentencing would "send not only the wrong message to [her daughter], but it would send the wrong message to this community and this State." The court's expression in this instance is merely conclusory and fails to address any of the factors enumerated in *Hooper*. A sentencing court must find *inter alia* that the "defendant's incarceration may rationally serve as a deterrent to others similarly situated and likely to commit similar crimes." *Hooper*, 29 S.W.3d at 13. Accordingly, given the lack of findings by the court on the record supporting the need for general deterrence in this particular case, we conclude that the court erred in denying alternative sentencing on this basis. *See Ashby*, 823 S.W.2d at 170 (stating that a court's finding of deterrence cannot be conclusory but must be supported by proof).

Although the trial court did not make sufficient findings to justify incarceration of the defendant on general deterrence grounds, we conclude that the trial court did not err by imposing confinement for the complete four year term based upon its need to avoid depreciating the seriousness of the offense and the defendant's low potential for rehabilitation. The defendant is without relief as to this issue.

C. Fines

The defendant challenges the amount of the fines imposed by the trial court as excessive and inappropriate.

The appellate court has the authority to review fines as a part of any sentence. *State v. Bryant*, 805 S.W.2d 762, 766-767 (Tenn. 1991). When an offense is punishable by a fine in excess of $50, it is the jury's responsibility to set a fine, if any, within the ranges provided by the legislature. *See* Tenn. Code Ann. § 40-35-301(b) (2003). The trial court, in imposing the sentence, shall then impose a fine in an amount not to exceed the fine fixed by the jury. *See id*. However, the trial court "may not simply impose the fine as fixed by the jury." *State v. Blevins,* 968 S.W.2d 888, 895 (Tenn. Crim. App. 1997). The trial court's imposition of fines are "to be based upon the factors and principles of the 1989 Sentencing Act, such as, prior history, potential for rehabilitation, financial means, and mitigating and enhancing factors, that are relevant to an appropriate, total sentence." *Id.* (citing *Bryant,* 805 S.W.2d 766). The trial court's imposition of a fine is also based upon the defendant's ability to pay the fine. *See State v. Marshall*, 870 S.W.2d 532, 542 (Tenn. Crim. App. 1993), *overruled on other grounds by State v. Carter,* 988 S.W.2d 145 (Tenn. 1999). A defendant's ability to pay, however, is not the controlling factor. *State v. Butler*, 108 S.W.3d 845, 853 (Tenn. 2003); *see also State v. Alvarado,* 961 S.W.2d 136, 153 (Tenn. Crim. App. 1996). A fine, in other

words, "is not automatically precluded because it works a substantial hardship on the defendant; it may be punitive in the same fashion incarceration may be punitive." *Marshall,* 870 S.W.2d at 542. Other relevant factors include prior history, potential for rehabilitation, and mitigating and enhancing factors that are relevant to an appropriate overall sentence. *See Blevins*, 968 S.W.2d at 895. The seriousness of a conviction offense may also support a punitive fine. *See Alvarado*, 961 S.W.2d at 153.

The record reflects that the jury imposed the following fines: $3,000 for criminal simulation under $1,000, $2,500 for theft of more than $1,000 but less than $10,000, $7,500 for tampering with the evidence, and $3,000 for forgery. The defendant received a total of $16,000 in fines. At sentencing, the trial court approved and affirmed the fines set by the jury after stating that it considered the factors required to determine the appropriateness of the fines and further stated, "I think there was a reason the jury chose to impose the fines that they imposed in this case, and I will not, based upon the evidence that's before the Court, come behind the jury's judgment on the fine question." The defendant argues that the judge did not weigh the amount of the fines against the defendant's ability to pay those fines and cites only to *State v. Bryant*, 805 S.W.2d 762 (Tenn. 1991).

Upon review, we conclude that the fines imposed by the jury were not excessive, and that the trial court did not err by upholding and imposing those fines. The fines imposed by the trial court did not exceed those set by the jury. *See* Tenn. Code Ann. § 40-35-301(b) (2003). The record reflects that the trial court reviewed the factors required to justify imposition of the jury's fines. *See Blevins*, 968 S.W.2d at 895. The defendant is not indigent, and the defendant's ability to pay the fines against her is not a controlling factor in the court's determination, but one of several factors the court may consider in weighing the appropriateness of the imposed fines. *See State v. Butler*, 108 S.W.3d at 853; *see also State v. Alvarado,* 961 S.W.2d at 153. Furthermore, beyond issuing a conclusory statement that she is unable to pay the fines levied against her, the defendant has made no showing of her inability to pay, or otherwise demonstrated that the fines imposed were inappropriate or excessive. *See Butler*, 108 S.W.3d at 852. Therefore, the defendant is not entitled to relief on this issue.

CONCLUSION

Based on the foregoing reasons and authority, we affirm the judgment of the trial court.

J.C. McLIN, JUDGE